



EVAN B. DONALDSON
ADOPTION INSTITUTE

525 Broadway, 6th Fl. New York, NY 10012

www.adoptioninstitute.org

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Evan B. Donaldson Adoption Institute

Comments to the State Department

On Proposed Regulations to Implement

The Intercountry Adoption Act and Hague Convention

Docket Number State/AR-01/96

December 15, 2003

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Introduction

The Evan B. Donaldson Adoption Institute (Adoption Institute) respectfully submits the following comments on the State Department's proposed regulations (proposed regulations or regulations) implementing the Intercountry Adoption Act (IAA) and the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption (Convention). The Adoption Institute – a non-profit research, education and policy organization with no affiliations to any constituency or interest group – has submitted recommendations to help inform the development of the regulations by the State Department and, previously, its contractor, Acton Burnell, over the past two years.¹ The Adoption Institute's mission is to improve the lives of everyone touched by adoption, especially children, by providing accurate, research-based information that will lead to more ethical, effective and informed policies, practices and laws.

The proposed regulations reflect substantial improvement over earlier drafts, but they require further refinement in order to effectively implement the Convention and IAA's objective: "to protect the rights of, and prevent abuses against, children, birth families, and adoptive parents involved in adoptions (or prospective adoptions) subject to the Convention, and to ensure that such adoptions are in the children's best interests."² The Adoption Institute advocates for regulations that provide clear, enforceable service quality standards, meaningful oversight, transparency, accountability and public education. These mechanisms would enable the State Department, the Accrediting Entity, accredited agencies and approved persons to fulfill the objectives of the Convention and IAA to safeguard the rights of all parties to adoption by making services more ethical, reliable and predictable. All of the Adoption Institute's recommendations are intended to advance the implementation of these mechanisms and objectives.

While the State Department has incorporated some of the Adoption Institute's previous proposals, other key recommendations have not been implemented or have been only partially addressed. Critical areas remain where the State Department should deal with deficiencies in the regulations to achieve the Convention and IAA's objective of protecting the rights of children, birth families and adoptive families, while improving international adoption services.

¹ See Testimony of Cindy Freidmutter, Executive Director, Evan B. Donaldson Adoption Institute On "International Adoptions: Problems and Solutions," Before the House Committee on International Relations, May 22, 2002 and the Adoption Institute's March 2002 and May 2001 recommendations.

² IAA § 2(b)(2).



Adam Pertman, Executive Director

Adoption Nation Education Initiative

T: 212-925-4089 F: 775-796-6592



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To fulfill these objectives, the Adoption Institute urges the State Department to

- require accredited agencies and approved persons to adhere to measurable and enforceable accreditation standards, compliance with which should be specifically explained in their contracts with prospective adoptive parents,
- mandate that Accrediting Entities collect and analyze provider performance data and the Complaint Registry resolve consumer complaints,
- clearly define Accrediting Entity and State Department enforcement responsibilities, with adverse actions explicitly linked to provider noncompliance, and
- educate the public about international adoption regulatory requirements, oversight and enforcement mechanisms and accredited agencies' and approved persons' compliance and performance data.

The State Department would strengthen the proposed international adoption regulations by incorporating the Adoption Institute's recommendations – and the benefits of doing so are greater now than they have ever been. That is because Americans are adopting increasing numbers of children from other countries – more than 20,000 in 2002 – and it is likely that the U.S. regulations will serve as a model for other countries implementing the Convention.

The Adoption Institute respectfully recommends that if complex regulatory issues (such as liability and enforcement) are not resolved in this rulemaking, the State Department should request Congressional hearings to examine these issues. In addition, because of the complexity of the proposed regulations and issues involved, as well as the competing perspectives on many of them, the Adoption Institute suggests that the State Department publish interim regulations for additional comment prior to publication of final regulations. Furthermore, the Adoption Institute requests that the State Department publish its draft contract(s) with the accrediting entities concerning accreditation standards and procedures, as well as with the Complaint Registry, because these are integral components of the rulemaking process required to fully implement IAA statutory requirements.

The Adoption Institute is limiting its comments to the issues on which it has submitted recommendations to the State Department in the past few years. The comments are organized in sections around these issues:

- accreditation standards,
- oversight,
- enforcement, and
- public education.

Each ensuing section begins with a general recommendation, followed by a justification and rationale, and concluding with specific suggestions to amend the proposed regulations. Throughout the document, existing proposed regulation language is quoted in regular type and Adoption Institute recommended additions to that language are in italics.



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T: 212-925-4089 F: 775-796-6592



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Accreditation Standards

Accredited agencies and approved persons should be required to adhere to measurable and enforceable accreditation standards, compliance with which should be specifically explained in their contracts with prospective adoptive parents.

Legal Responsibility and Liability

The State Department accepted a number of Adoption Institute recommendations to ensure that accredited agencies and approved persons (AA/AP) acting as primary providers (PP) are legally responsible, and liable, for acts of their supervised providers, inside and outside the United States. These requirements create a liability chain legally binding providers to a single process for enforcement, implementing IAA provisions that penalize AA/AP for the unlawful acts of their agents in the U.S. and foreign countries, while mandating that AA/AP establish measures to ensure their agents comply with the Hague Convention and IAA.³ The improved standards will hold primary providers accountable for service quality and regulatory compliance and help ensure that they work with reputable providers, thus resulting in better quality and more ethical and predictable international adoption services.

The proposed regulations reflect improvements in requiring primary providers to:

- be legally responsible for cases in which supervised providers in the U.S. and abroad provide adoption services and⁴
- assume, under certain conditions, civil liability to prospective adoptive parents for supervised providers' services and the compliance of these services with the law and the regulatory standards.⁵

A number of organizations, however, have expressed concern that the proposed regulations extend AE and primary provider liability,⁶ including insurance liability,⁷ to supervised providers. Their concern is that these requirements may increase their costs of doing business and/or prevent them from obtaining commercial liability insurance because of the risks posed, in particular, by overseas agents over whom they do not have direct control. The Adoption Institute acknowledges that some of these concerns may be valid, and, furthermore, believes that these requirements may place undue emphasis on compensation and liability, as opposed to standards-based accreditation and enforcement. Consequently, the Adoption Institute recommends that the State Department change the regulations to accommodate an alternative approach to insurance and liability.

Above all, the Convention and IAA are tools for protecting children involved in intercountry adoption, while facilitating legal intercountry adoptions. In this context, the primary objectives of regulations implementing the IAA, with respect to liability and insurance, are to incentivize

³ IAA §§ 404(a)(3), 203(b)(1)(F).

⁴ §§96.45(b)(8) and 96.46(b)(9).

⁵ §§96.45(c)(1) and 96.46(c)(1).

⁶ §96.45 and §96.45(b)(8), (c) and (d) and §96.46(b)(9), (c) and (d).

⁷ §§96.33(g) and (h).





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AA/AP to minimize or avoid potentially risky behavior and to facilitate legal adoptions. These objectives are best achieved through the mechanisms mandated by the IAA -- consistent and rigorous application and enforcement of standards of accreditation throughout the liability chain of intercountry adoption providers,⁸ and through civil and criminal penalties for malfeasance or fraud.⁹ Compensation through civil court actions of families adversely affected by negligent, malfeasant or fraudulent practices of AA/AP, on the other hand, is not the IAA's objective and, accordingly, the regulations should not elevate it above the accreditation and enforcement functions that the IAA dictates.

The primary and supervised provider concepts are necessary, desirable tools for the achievement of these accreditation and enforcement objectives.¹⁰ The failure of U.S. persons and agencies primarily responsible for the provision of adoption services to adequately supervise their agents, domestically and abroad, in too many cases has encouraged risky, negligent or illegal behavior by those agents. Recent and continuing cases involving alleged misconduct by the foreign agents of U.S. adoption agencies in Cambodia, Guatemala, Haiti, Liberia, Romania, Vietnam and elsewhere are disturbing cases in point. The prevention and the administrative and judicial sanction of such behavior are consistent with the Convention's objectives and are required by statute, and the regulations should more effectively implement these objectives. These accreditation and enforcement objectives, however, should not be construed in such a way as to encourage private litigious behavior. Encouragement of civil litigation and potentially large out-of-court settlements is not, and should not be, a substitute for effective regulation.

Accordingly, the Adoption Institute recommends that the State Department:

- preserve the primary and supervised provider concepts in the liability chain of intercountry adoption as set forth in §§96.14, 96.44, 96.45 and 96.46;
- augment the enforcement, accreditation and maintenance of accreditation standards and procedures throughout the liability chain, by modifying Subpart F standards (e.g., by adding rigorous and specific requirements for investigation by AE of the practices, policies and due diligence procedures and outcomes used by AA/AP in dealing with supervised providers and by permitting specific waivers in §96.39); and
- provide safe harbor assurances to primary providers who comply with or exceed these augmented standards and procedures in their use of supervised providers, therefore providing ethical primary providers with appropriate defenses against litigation under §96.45 and §96.46 and the option in §96.33 for primary providers to exclude supervised providers from liability insurance coverage where specified safe harbor standards are met.¹¹

⁸ IAA §§201-204.

⁹ IAA §404.

¹⁰ §§96.14, 96.44, 96.45, and 96.46.

¹¹ Since the safe harbor provision pertains to a particular supervised provider and most insurance policies are general in nature, to truly derive an insurance benefit from the safe harbor, the agency or person will have to fulfill the conditions of safe harbor for substantially all of the supervised providers with which they work.





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In addition, if these measures should prove insufficient to address the liability and insurance challenges to service providers, and in order to minimize litigation and unnecessary costs, the State Department may wish to consider requiring aggrieved parties to enter into binding arbitration with capped awards, in lieu of litigation.

The Adoption Institute specifically recommends that the State Department modify the legal responsibility and liability provisions by:

- amending §96.6(c) so AE "can monitor the performance of agencies it has accredited and persons it has approved, *including primary providers' practices with respect to and oversight of supervised providers*, to ensure their continued compliance with the Convention, the IAA, and the regulations implementing the IAA."
- adding subsection (d) to §96.32 requiring "*The agency or person has in place procedures and standards, pursuant to §§96.45 and 96.46, for due diligence on and selection, monitoring and oversight of supervised providers.*"
- amending §96.33(h) to read "The agency or person maintains insurance in amounts reasonably related to its exposure to risk, including, *subject to the safe harbor exclusions permitted in §96.45(e) and §96.46(e)*, the risks of providing services through supervised providers, but in no case in an amount less than \$1,000,000 per occurrence."
- requiring AA/AP to disclose information about their supervised providers by adding "*and its supervised providers*" at the end of §96.35(b).
- adding a subsection (4) to §96.39(a) requiring disclosure of "*A statement explaining the general risks reasonably associated with work undertaken by the agency or person and their supervised providers with whom the prospective client(s) can expect to work in the United States and in the child's country of origin.*"
- substituting §96.39(a)(3) with:
 - "*the identity of each supervised provider with whom the client(s) can expect to work in the United States and in the child's country of origin;*
 - "*a statement of the relationship(s) between the client(s), the primary provider and each supervised provider, including specification of the flow of responsibilities, liability and funds between the various parties;*
 - "*a description of the services to be provided by each supervised provider;*
 - "*the responsibilities of the client(s) with respect to each supervised provider; and*
 - "*an assessment of the specific risks reasonably associated with work undertaken by each supervised provider.*"
- adding to §96.39(d) the provision, "*The agency or person requires a client or prospective client to sign waivers of liability in connection with the provision of adoption services in Convention cases only where:*
 - "*the waiver(s) is reasonable and fully discloses and identifies the specific events of risk or liability being waived;*
 - "*the waiver is obtained through informed consent of the client;*
 - "*the waiver(s) use a uniform waiver form approved by the Secretary; and*



Adam Pertman, Executive Director

Adoption Nation Education Initiative

T: 212-925-4089 F: 775-796-6592

- the agency or person does not obtain from any Convention adoption client any agreement containing exculpatory language through which the client waives any of the client's legal rights, or which releases the agency or person or their supervised providers or agents from liability for negligence or intentional wrongdoing."¹²
- adding a subsection (i) to §96.40 requiring "Where the agency or person is acting as a primary provider, it provides to all applicants the fee policies and procedures information specified in §96.40(a) through (h) for each of its supervised providers."
- adding a subsection (i) to §96.41 providing "Where the agency or person is acting as a primary provider, the procedures specified in §96.41(a) through (h) include any and all complaint(s) relating to both the primary provider and to any and all supervised provider(s)."
- amending §96.45, Using Supervised Providers in the United States, in the following ways:
 - adding a requirement in §96.45(b) that "ensures that each such supervised provider (whether accredited or non-accredited) operates under a written agreement with the primary provider."
 - defining "reasonable period," "timely basis," and "promptly" in §§96.45(b)(10)-(12), requiring supervised providers to submit information to primary providers, to mean 15 business days,
 - adding a clause at the end of §96.45(c)(1): "Assumes tort, contract, and other civil liability to the prospective adoption parent(s) and adoptive parents for the supervised provider's provision of the contracted adoption services and its compliance with the standards in this subpart F, subject to the limitations specified in §96.45(e)."
 - amending §96.45(c)(2) to read: "Maintains a bond, escrow account, or liability insurance in an amount sufficient to cover the risks of liability arising from its work with supervised providers, to the extent that such liability is not limited in §96.45(e)."
 - adding a new section §96.45(e):

"The fulfillment by an agency or person acting as primary provider or, where applicable, as supervised provider(s), of all of the following conditions shall comprise a safe harbor, limiting primary providers' civil liability risk arising from the actions of the applicable supervised provider(s) and shall release the primary provider from the requirements in §96.45(c)(2) and §96.33(h) with respect to the applicable supervised provider(s):

 1. *the primary provider has in place specific, measurable procedures for conducting investigatory due diligence on the supervised provider(s), including, not less than once per year, regular but unannounced checks/inspections of the operations and accounts of the supervised provider;*
 2. *the supervised provider(s) is not/has not been the subject of any of the adverse actions described in §96.35(b)(1),(2),(3),(4),(6) and (7);*
 3. *the supervised provider(s) is in compliance with all provisions specified in §96.45(a)(1) through (3) and §96.45(b)(1) through (13);*
 4. *the supervised provider(s) has provided adoption services in a minimum of ten [10] separate cases (adoptions) in the past five [5] years; and*

¹² The proposed language for §96.39(d)(3) is adapted from the comments of the American Adoption Congress.



5. the prospective adoptive parent(s) have been provided with and have executed a uniform waiver, approved by the Secretary, of the specific risks which might reasonably arise as a function of the work of the supervised provider(s)."

• amending §96.46, Using Supervised Providers in other Convention countries, in the following ways:

- adding a subsection at the beginning of §96.46 requiring "*Foreign affiliates and subsidiaries of U.S. AA/AP are subject to the requirements of §96.45 and §96.46.*"
- adding a subsection in 96.46(a) that "*ensures that each such foreign supervised provider is accredited by the Convention country in which it operates.*"
- amending 96.46(b)(4) to read that compensation be "on a fee-for-service, hourly wage, or salary basis, and not based on whether a child is placed for adoption or on a similar contingency fee basis," substituting "and not" for "rather than."
- defining "reasonable period," "timely basis," and "promptly" in §§96.46(b)(10)-(12), requiring supervised providers to submit information to primary providers, to mean 15 business days,
- adding a clause at the end of §96.46(c)(1) "*Assumes tort, contract, and other civil liability to the prospective adoption parent(s) and adoptive parents for the foreign supervised provider's provision of the contracted adoption services and its compliance with the standards in this subpart F, subject to the limitations specified in §96.46(e).*"
- amending §96.46(c)(2) to read: "*Maintains a bond, escrow account, or liability insurance in an amount sufficient to cover the risks of liability arising from its work with foreign supervised providers, to the extent that such liability is not limited in §96.46(e).*"
- adding a new section §96.46(e):

"The fulfillment by an agency or person acting as primary provider or, where applicable, as supervised provider(s), of all of the following conditions shall comprise a safe harbor limiting primary providers' civil liability risk arising from the actions of the applicable foreign supervised provider(s) and shall release the primary provider from the requirements in §96.46(c)(2) and §96.33(h) with respect to the applicable supervised provider(s):

- 1 *the primary provider has in place effective procedures for conducting investigatory due diligence on the supervised provider(s), including, not less than once per year, periodic unannounced checks/inspections of the operations and accounts of the supervised provider;*
- 2 *the supervised provider(s) is not/has not been the subject of any of the adverse actions described in §96.35(b)(1),(2),(3),(4),(6) and (7) ;*
- 3 *the supervised provider(s) is in compliance with all provisions specified in §96.46(a)(1) through (4) and §96.46(b)(1) through (13);*
- 4 *the supervised provider(s) has provided adoption services in a minimum of ten [10] separate cases (adoptions) in the past five [5] years; and*
- 5 *the prospective adoptive parent(s) have been provided with and have executed a uniform waiver, approved by the Secretary, of the specific risks which might reasonably arise as a function of the work of the foreign supervised provider(s), such*





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risks to give special consideration to the unique circumstances of the country or countries in question."

Contracts, Financial Controls and Information Disclosure

For fees, terms and conditions of service to have weight and meaning, they must be included in adoption contracts to protect prospective adoptive parents and providers alike by providing clarity, predictability and reliability about the parties' respective rights and responsibilities, as well as guidance to AE, Complaint Registry and courts in the event of complaints and disputes. Otherwise, both providers and clients may have different understandings of the provision of services and payment of fees, and neither party will have an incentive to adhere to terms and conditions or recourse in the event of nonperformance. Adoption service contracts between AA/AP and prospective adoptive families should enumerate in plain language all of the information the regulations require AA/AP to disclose and how providers comply with regulatory standards, such as the mandate to provide the six adoption services and fund-transfer policies.

The proposed regulations include information disclosure as a standard of accreditation, but fail to adequately stipulate what information must be provided and that it be included in an enforceable contract.¹³ The regulations do not require AA/AP to provide critical information that would enable prospective clients to make informed decisions about purchasing services from providers, such as payment schedule and method and policies for the collection of health information about children. Furthermore, the proposed regulations fail to specify that terms and conditions of service be provided in a written contract, so providers and clients alike are bound by the agreements. For instance, §96.39(a)(1) directs AA/AP to provide critical information, including rights and responsibilities, in writing but not in contracts. Additionally, the regulations are unclear in their requirement that agencies and persons give "prospective client(s) upon initial contact" a "sample of a contract *substantially like* the one that the prospective client(s) will be expected to sign should they proceed."¹⁴

While the proposed regulations include the provision of "a written schedule of estimated fees and expenses" as an accreditation standard, they do not specify that fee and expense information must be included in contracts, a critical and routine element of service contracts.¹⁵ In the same section, however, is a standard that "the agency or person does not customarily charge additional fees and expenses beyond those *disclosed in the adoption contract* and has a written policy to this effect."¹⁶ So, while 96.39(a)(1) and 96.40(a) provide that AA/AP give prospective adoptive parents written fee information, 96.40(f) assumes this information is

¹³ §§96.39-96.40.

¹⁴ §96.39(a)(2) (emphasis added).

¹⁵ §96.40(a).

¹⁶ §96.40(f) (emphasis added). §96.40(c) also states that refund policies for advanced funds be included in contracts. §96.50(f) and §96.51(b)-(c) cover the inclusion of responsibilities in the event of disruption and post-adoption services and reports, respectively.





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ADOPTION INSTITUTE

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provided in a contract. Sections 96.39(a), (b), (d) and 96.40 must be amended so that all of the stipulated information, in addition to that recommended below, is provided in contracts.

The Adoption Institute urges the State Department to amend §§96.39 and 96.40 by inserting at the beginning of both sections that "The agency or person fully discloses *in adoption service contracts provided* to the general public upon request and to prospective client(s) upon initial contact *all of the information mandated by this section*" and by substituting §96.39(a) with the following contract elements (and deleting and §96.40(a)):

- adoptive parent eligibility criteria,
- mutual rights and responsibilities of adoptive parents and AA/AP,
- services to be delivered by the primary agency/person and associated itemized fees,
- names of supervised providers inside and outside the U.S. (recognizing that the latter and other country-specific information disclosure below will depend on the client's country of interest) that will provide services, their accreditation status, the specific services each will provide, their itemized fees, and
 - practices, policies and procedures for complying with sections §§96.45 and 96.46, including the new subsections (e) relating to safe harbors,
 - a statement of the relationship(s) between the client(s), the primary provider and each supervised provider, including specification of the flow of responsibilities, liability and funds between the various parties,
 - monitoring of the supervised providers by the primary provider,
 - responsibilities of the client(s) with respect to each supervised provider, and
 - an assessment of the specific risks reasonably associated with work undertaken by each supervised provider.
- payment schedule and method,
- conditions under which fees/costs are charged, waived, reduced, refunded or returned,
- required contributions to the government or to child welfare service programs in the child's country of origin,
- itemized costs and fees for the adoption in the child's country of origin, including travel,
- official and recorded funds-transfer procedure for payment of fees outside the U.S.,
- policy for disclosure and payment of unforeseen additional costs,
- provision of records documenting actual fees and costs incurred,
- liability policy of the AA/AP, including legal obligations under the regulations and other laws for the acts of their employees, agents and contractors in the U.S. and overseas,
- policy that employees, contractors and agents are paid on a fee-for-service basis, not a contingency basis,
- disruption and dissolution rates of the primary providers' adoptions for the country in which services are being provided,
- policy in the event of disruption, dissolution, incomplete placement or incomplete adoption,
- policy and procedure for obtaining and disclosing child-specific medical information,
- policy and procedure for retaining and disclosing adoption records, including non-identifying and identifying information,



Adam Pertman, Executive Director Adoption Nation Education Initiative T: 212-925-4089 F: 775-796-6592